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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 35

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of Kessco Engineering Corporation, and Harry C. Westover, Collector of Internal Revenue for the Ninth Collection District of California,

Petitioner,

vs.

DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA, Statutory Assignee, etc.,

Respondent.

RESPONDENT'S OPPOSING BRIEF.

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SUBJECT INDEX

	PAGE
Opinion below	2
Statement of case	2
Statutes involved	2
Question presented	2
Argument	3
Conclusion	8

TABLE OF AUTHORITIES CITED

CASES PAGE

Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300 3

Bailey v. Baker Ice Machine Co., 239 U. S. 268 3

City of New Orleans v. Harrell, 134 F. (2d) 399 6

City of New York v. Hall, 139 F. (2d) 935 6

Everett v. Judson, 228 U. S. 474 3

International Harvester Co. of America, 9 F. (2d) 299 .... 4, 5

Myers v. Matley, 318 U. S. 622 3

Pennsylvania Central Brewery Co., In re, 114 F. (2d) 1010; cert. den. 312 U. S. 685 6

United States v. Marxen, 307 U. S. 200 3

White v. Stump, 266 U. S. 310 3

STATUTES

Bankruptcy Act, Sec. 64, Subd. (a) (11 U. S. C., Chap. 7, Sec. 104) 2, 4

Bankruptcy Act, Sec. 67, Subd. (c) (11 U. S. C., Chap. 7, Sec. 107) 1, 2, 6

TEXTBOOKS

4 Collier on Bankruptcy (14th Ed.), pp. 157, 235 7

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DIVISION OF LABOR LAW ENFORCEMENT, STATE OF CALIFORNIA, Statutory Assignee, etc.,

Respondent.

RESPONDENT'S OPPOSING BRIEF.

Petitioner seeks a review by this Honorable Court of a final judgment of the United States Circuit Court of Appeals for the Ninth Circuit. The judgment holds that by voluntarily relinquishing possession to the Receiver in Bankruptcy personal property on which there was a tax lien, the Collector of Internal Revenue, although retaining his lien claim, subrogated the lien to payment of prior wage claims by virtue of the specific provisions of Section 67(c) of the Bankruptcy Act; that a bargain between the Collector of Internal Revenue and the Receiver in Bank-

ruptcy providing that the lien would apply to the property and proceeds from the lien sale after relinquishment of possession, could not set aside statutory rights of the prior wage claimants.

Opinion Below.

The opinion of the Circuit Court of Appeals, set forth in full in the appendix of Petitioner's Brief, is reported at 165 F. (2d) 155.

Statement of Case.

The facts set forth in Petitioner's Petition, pages 6 to 9 inclusive, are accurately stated and for purposes of brevity are not here repeated.

Statutes Involved.

The statutes involved: Section 64, Subdivision (a) of the Bankruptcy Act (United States Code, Title 11, Chap. 7, Sec. 104); and Section 67, Subdivision (c) of the Bankruptcy Act (United States Code, Title 11, Chap. 7, Sec. 107); are set forth in Petitioner's Petition, pages 3 to 5 inclusive, and for purposes of brevity are not here repeated.

Question Presented.

Does the decision rendered herein by the United States Circuit Court of Appeals for the Ninth Circuit conflict with applicable decisions of the Supreme Court of the United States, conflict with the Bankruptcy Act or conflict with decisions rendered in other Circuits of the United States Circuit Court of Appeals?

Argument.

The decision of the United States Circuit Court of Appeals is not in conflict with:

A. Applicable decisions of the Supreme Court of the United States.

B. The decisions rendered in other Circuits of the United States Circuit Court of Appeals.

C. The Bankruptcy Act.

A. On page 10 of Petitioner's Petition six cases decided by this Court are cited. These cases enunciate the established bankruptcy rule that rights of all creditors and their priorities are determined at the time bankruptcy proceedings are instituted.

Myers v. Matley (1943), 318 U. S. 622;

U. S. v. Marxen (1939), 307 U. S. 200;

White v. Stump (1924), 266 U. S. 310;

Bailey v. Baker Ice Machine Co. (1915), 239 U. S. 268;

Everett v. Judson (1913), 228 U. S. 474;

Acme Harvester Co. v. Beekman Lumber Co. (1911), 222 U. S. 300.

This rule is not an issue in the instant case for the rule concerns itself with the rights and status of creditors of the bankrupt as against the trustee in bankruptcy and has nothing to do with the question of priority in payments as between creditors from the assets of the bankrupt's estate.

In *Bailey v. Baker Ice Machine Co.*, *supra*, it is said:

"When not otherwise specially provided, the rights, remedies, and powers of the trustee are determined

with reference to the conditions existing when the petition is filed. It is then that the bankruptcy proceeding is initiated, that the hands of the bankrupt and of his creditors are stayed, and that his estate passes actually or potentially into the control of the bankruptcy court. We have said: 'The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate.'"

There is no conflict with that rule; respondent has never sought, nor has the court below granted, any enlargement of the prior labor claims. The prior wage claims were definitely and irrevocably fixed in amount as a liability of the estate of the bankrupt under the provisions of Section 64, Subdivision (a) of the Bankruptcy Act; they were correctly calculated as being amounts due for wages earned and unpaid during the three months' period immediately prior to the filing of the period in bankruptcy, not in excess of $600.00 each.

The decision of the United States Circuit Court of Appeals for the Ninth Circuit interpreting a section of the Bankruptcy Act concerning priority payments of established prior wage claims over established lien claims on personal property does not violate the rule of this Court set forth above, or any other rule or interpretation of law enunciated by this Court.

B. On page 10 of Petitioner's Petition it is stated that the decision of the Circuit Court of Appeals for the Ninth Circuit is in conflict with the decision rendered in the Sixth Circuit in the petition of *International Harvester Co. of America* (C. C. A. 6th), 9 F. (2d) 299. There is no such conflict and the cases are clearly distinguishable.

In the *International Harvester* case the issue was whether the chattel mortgagee had possession prior to and at the time of bankruptcy, since the existence of the lien depended on possession. In the instant case existence of the lien does not depend on possession, and it has never been contended by Respondent that the lien fell following surrender of possession by the Collector of Internal Revenue to the Receiver. Respondent urged below that surrender of possession merely withdrew from the lien claim its suprior position over prior wage claims. The Court below upheld this contention, stating:

> "In the instant case the government had actual possession, but it surrendered that possession by virtue of a bargain with the receiver without taking into account the wage and creditor claimants. The Act provides that wage claims come ahead of the government lien in distribution of the proceeds of sale of property not in possession of the government lien holder."

Further, the general question of surrender of possession was not decided in the *International Harvester* case. The Court states:

> "Therefore, notwithstanding our concurrence in the construction of the statute the petition to revise is granted, and the cause remanded, to permit the parties to amend the pleadings, and thereupon to determine whether or not, in the circumstances, petitioner obtained a valid lien by virtue of its possession prior to and at the time of filing the petition in bankruptcy (see Peter Schultler Co. v. Gunther, 222 Mich. 430, 192 N. W. 661, 49 Am. Bank. Rep. 678), and, if so, whether or not it waived this lien by reason of the surrender of the actual possession to the receiver."

Actually the decision of the United States Circuit Court of Appeals for the Ninth Circuit is in accord with all decisions of the United States Circuit Court of Appeals rendered in other Circuits. Judge Stephens in his opinion cites and agrees with the decision of the Second Circuit rendered in the case of *City of New York v. Hall*, (C. C. A. (2d) 1944), 139 F. (2d) 935. The decision follows the enunciation of principle laid down by the Third Circuit in the case of *In re Pennsylvania Central Brewery Co.* (C. C. A. 3, 1940), 114 F. (2d) 1010 (certiorari denied, 312 U. S. 685). There the Court in interpreting Section 67, subdivision (c) of the Bankruptcy Act stated:

> "If there is a statutory lien upon personal property not accompanied by possession or a distress for rent (which is always upon personal property) whether statutory or not, such liens are postponed in payment to expenses of administration and wage claims."

The Fifth Circuit in the case of *City of New Orleans v. Harrell* (C. C. A. 5, 1943), 134 F. (2d) 399, at page 401, in interpreting the effect of Section 67, subdivision (c) of the Bankruptcy Act on a lien claim refers to the class in which the Collector of Internal Revenue finds himself in the instant case, that is "a special class of secured creditors whose claims are postponed in payment to the debts specified in clauses (1) and (2) of Section 64, sub. a of said Act."

Respondent knows of no case decided by the Circuit Court of Appeals contrary to the decision rendered by the Ninth Circuit in the instant case.

C. The decision of the Circuit Court of Appeals for the Ninth Circuit is completely in accord with the letter and spirit of the Bankruptcy Act and not in conflict with

it. The Congress in 1938 when it amended the Bankruptcy Act sought to further protect the wage claims of unpaid employees of a bankrupt and the decision follows this intent.

The background of this legislation is set forth in Collier on Bankruptcy, 14th ed., Vol. 4. At page 157 it states:

> "And under the Act of 1898 all liens valid in bankruptcy had precedence over unsecured claims entitled to priority under Sec. 64: only after the discharge of such liens were assets available for distribution, first to priority claimants, and second to other unsecured creditors having no priority. This general principle remains true under the Act of 1938, subject to the fact that Sec. 67c subordinates statutory liens under certain circumstances to debts having first and second priority under Sec. 64."

At page 235 it states:

> "The function of Sec. 67c is entirely different. In effect Sec. 67c says that *statutory* liens on personal property not accompanied by possession, and liens, whether statutory or not, of distress for rents, regardless of possession, are inferior to *all* administrative costs and expenses of the bankruptcy proceeding and *wage claims*, which are entitled, respectively, to a first and second priority under Sec. 64a. This principle whereby certain liens are subordinate to certain priorities is new to bankruptcy law, being first introduced by the Act of 1938. It is a statutory principle which Congress introduced to provide a measure of much-needed protection, . . . (2) for wage claims in the interest of protecting a weak but deserving economic class, against the ravages of certain accumulated liens on the bankrupt's property." (Emphasis theirs.)

Conclusion.

We respectfully urge that the petition filed herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

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